FILED
JUN 28 1993
OFFICE OF THE CLERK

No. 92-1292

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

SIDNEY S. ROSDEITCHER
(Counsel of Record)

PETER L. FELCHER
STUART M. COBERT
CLAUDIA L. HAMMERMAN*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Respondent

*Awaiting admission to the Bar of the State of New York

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Question Presented

Whether petitioners' song that arguably parodied respondent's well-known copyrighted song was a "fair use" of the copyrighted song, where petitioners' song copied extensively from the copyrighted song, relied for its music almost entirely on the melodic refrain and musical "heart" of the copyrighted song, and was then marketed to hundreds of thousands of record buyers as part of a "rap" album on which it was advertised as respondent's copyrighted song.

Rule 29.1 Listing

Acuff-Rose Music, Inc. is a Tennessee corporation. It is a wholly-owned indirect subsidiary of Gaylord Entertainment Company, a publicly held corporation.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

STATEMENT OF THE CASE

Contrary to the impression petitioners and amici create, this case is not about whether parody can ever be a fair use if it is sold for a profit. This case is about whether petitioners, whatever the claimed parodic purpose of their song, were principally engaged in an unfair attempt to cash in on the commercial appeal of respondent's copyrighted musical composition. The resolution of that question turns on the particular facts of this case.

Nature of the Action

This is a copyright infringement action concerning a song recorded by petitioners, members of the highly successful rap group known as 2 Live Crew. (J.A. 87) The 2 Live Crew recording, entitled "Pretty Woman," purportedly parodies the well known copyrighted musical composition, "Oh, Pretty Woman"—a pop music classic written in 1964 by Roy Orbison and William Dees. (J.A. 143) Respondent Acuff-Rose is the assignee of the copyright to "Oh, Pretty Woman." (J.A. 143, 17)

2 Live Crew recorded "Pretty Woman" in March, 1989 and released it in June, 1989, as part of an album entitled *As Clean As They Wanna Be*. (J.A. 85, J.A. 228) The album and compact disc covers and the inner labels identify the song simply as "Pretty Woman" written by Orbison and Dees and published by Acuff-Rose.[1] (Campbell Aff. Ex. C)

The 2 Live Crew recording of "Pretty Woman" copies verbatim the opening lyrics of "Oh, Pretty Woman" and copies exactly its introductory guitar "riff"[2]—the indisputable musical "heart" of the copyrighted song—and its initial melodic refrain. (*See* J.A. 32, 140) As in the copyrighted song, the guitar riff and the melodic refrain are repeated throughout the 2 Live Crew version. Indeed, the music of the 2 Live Crew recording consists of little else, except for the injection of certain rap conventions.

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[1] The covers and labels also identify BMI. The copyright to a musical composition includes the right to record the song and the separate right to publicly perform the song. *See* 17 U.S.C. § 106(1) and (4). Acuff-Rose owns the entire copyright including the recording rights, and has licensed BMI to administer the performance rights in the United States.

[2] A "riff" is "a constantly repeated musical phrase used especially as background for a soloist or as the basic theme of a final chorus." Webster's New World Dictionary (3d ed. 1988).

(*Compare* Complaint, Ex. D *with* Complaint, Ex. E).[3] The 2 Live Crew version, however, after copying the opening lyrics of the copyrighted song, changes the original lyrics. Unlike the original lyrics that are about a lonely man's romantic longing for a pretty woman he sees walking down the street, 2 Live Crew's verses taunt a succession of unappealing women, including a "big hairy woman," a "bald headed woman" and a "two timin' woman." (J.A. 24-25)

On July 5, 1989, after their recording of "Pretty Woman" was already released (J.A. 84-85), 2 Live Crew's manager asked Acuff-Rose for a license for "Oh, Pretty Woman." (J.A. 87-88) Describing 2 Live Crew as "one of the most successful rap groups in the country today," whose albums "have gone Gold and are close to Platinum,"[4] she goes on to say:

> At the time of this writing the Group [2 Live Crew] has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain [sic] to what Weird Al Yankovic and other satirical artists are doing.

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[3] At several points, 2 Live Crew injects a scraping sound or "scraper" (probably produced by scraping a record turntable arm over a record) and one member of the group sings off key. These stylistic additions are typical of rap. *See* Richard Shusterman, *The Fine Art of Rap*, 22 New Literary History 613, 617 (1990); Catherine I. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. of Negro Education 245, 245-46 (1991); Alan Light, *About a Salary or Reality?—Rap's Recurrent Conflict*, 90 South Atlantic Quarterly 855, 862 (1992).

[4] A "gold" record is a record that has sold at least 500,000 copies. *See United States* v. *Music Masters*, 621 F. Supp. 1046, 1050 (W.D.N.C. 1985), *aff'd*, 816 F.2d 674 (4th Cir. 1987). A "platinum" record is a record that has sold at least 1,000,000 copies. *Id.*

> We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.
>
> Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a novelty record that will be heard by hundreds of thousands of new listeners in their homes.

(*Id.*) On July 17, 1989, Acuff-Rose refused the request, stating that "we cannot permit the use of a parody of 'Oh, Pretty Woman'." (J.A. 89)

2 Live Crew nevertheless continued to market the album containing "Pretty Woman" and by August, 1990 had sold 248,000 copies. (J.A. 85) In June, 1990 Acuff-Rose brought this suit for infringement of the copyright to "Oh, Pretty Woman."

The District Court Proceedings

The elements of copyright infringement were never contested below. Instead, petitioners made a motion to dismiss the complaint (J.A. 28), later converted into a motion for summary judgment (*see* J.A. 99), contending that their recording of "Pretty Woman" was a parody that fell within the "fair use" exception to the copyright monopoly codified in Section 107 of the Copyright Act of 1976 (the "Copyright Act").[2/]

[2/] Section 107 of the Copyright Act, 17 U.S.C. § 107 (Supp. 1993) provides:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom (continued...)

The district court granted the motion for summary judgment. It concluded that the 2 Live Crew version was a comic parody of "Oh, Pretty Woman" that made fair use of the copyrighted song because it "appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose," 754 F. Supp. at 1157, and because it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." *Id.* at 1158. In reaching this latter conclusion, the District Court found that the 2 Live Crew version and the original Orbison song were aimed at different audiences. *Id.* This conclusion reflected affidavit testimony that contended that the original Roy Orbison recording of the copyrighted song was directed to a middle class country audience, while the 2 Live Crew recording was directed to an audience of a "disaffected" "black populace who used to buy what were once called 'race' records." (*See* J.A. 35; *see also* J.A. 95) The district court brusquely rejected the contention that the 2 Live Crew recording could

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[2/](...continued)

> use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

adversely affect Acuff-Rose's right to market future derivative works of the copyrighted song,[2] including rap versions of the work, with the observation that since 2 Live Crew's recording "is a parody, that [recording] has not prevented Acuff-Rose from recording whatever version of the original it desires." 754 F. Supp. at 1158.

The Sixth Circuit Decision

A two-to-one majority of the Sixth Circuit reversed. Concluding that the material facts were not in dispute and that only a legal judgment based on the facts was involved, 972 F.2d at 1434, the Sixth Circuit held that a review of the four statutory factors did not support a finding of fair use. *Id.* at 1439.

With regard to the first factor (purpose and character of the use), the Sixth Circuit majority expressed "considerable reservation" that the 2 Live Crew recording was a "parody" in any legal sense, but assumed for purposes of the appeal that it was. 972 F.2d at 1435 & n.8. The court, nevertheless, found that the admittedly commercial purpose of the use required a finding against fair use on the first factor. *Id.* at 1437.

The Sixth Circuit recognized that "commercial purpose is not itself controlling on the issue of fair use," *id.* at 1436–37, but found that "the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that '[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'" *Id.* at 1437, *quoting Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 562 (1985) (citation omitted).

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[2] One of the rights belonging to the copyright owner, Acuff-Rose, is the right to make a derivative work, which is defined in the Copyright Act as a work "based upon one or more preexisting works, such as a ... musical arrangement ... sound recording ... or any other form in which a work may be recast, transformed or adapted." 17 U.S.C. § 101.

The Sixth Circuit majority therefore started from the presumption that 2 Live Crew's commercial recording was not a fair use, but then proceeded to consider whether 2 Live Crew "met its burden to rebut the presumption by a defense ... requiring the court to be convinced that the 'parody does not unfairly diminish the economic value of the original.'" *Id.* (citation omitted).

The Sixth Circuit found that the second factor (nature of the work) also weighed against fair use in view of the creative nature of the copyrighted work. *Id.* It next found that, because taking the "heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original," *id.* at 1438, the facts developed under the third factor (amount and substantiality of the portion used in relation to the copyrighted work as a whole) "cannot be used in any way to support a finding of fair use." *Id.*

In assessing the fourth factor (the effect on the potential market for or value of the copyrighted work), the Sixth Circuit emphasized this Court's direction in *Harper & Row* that consideration must be given to potential harm not only to the original but also to the market for derivative works. *Id.* Moreover, relying on this Court's opinion in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), the Sixth Circuit determined that where, as here, the use of the copyrighted work is for commercial purposes, the likelihood of future harm is presumed. 972 F.2d at 1438. The Sixth Circuit then determined that this presumption had not been overcome by the evidence relied on by the district court because that evidence failed to address the potential harm to the market for derivative works. *Id.* at 1439. It therefore held that "the record on [the fourth factor] does not support a finding of fair use." *Id.*

SUMMARY OF ARGUMENT

This case demonstrates the soundness of this Court's insistence that no uses of copyrighted material, even such uses as news reporting and others specifically enumerated in the preamble to Section 107, are to be treated as presumptively fair, but must be evaluated on a case-by-case basis under equitable considerations that include at least the four factors listed in Section 107.

Here, the excessive appropriation of the copyrighted work together with the mass marketing of "Pretty Woman" as the copyrighted work itself leave no doubt that, whatever their parodic purpose, 2 Live Crew sought to cash in on the commercial appeal of "Oh Pretty Woman" and to take for themselves profits that the Copyright Act intended as incentives for the creators of the original song.

It is these circumstances that render the use presumptively unfair. The "commercial use" presumption enunciated in *Sony* and relied upon by the Sixth Circuit does not apply merely because a user makes a profit. As this Court explained in *Harper & Row*, it applies where a user, notwithstanding the arguable social benefits of his use, seeks primarily to profit from the commercial value of the copyrighted work itself. In those circumstances, the "commercial use" presumption quite reasonably requires the user to bear the burden of proving that the use will not harm the potential market for, or value of, the copyrighted work.

The Sixth Circuit correctly concluded that petitioners failed to meet their burden. Indeed, as we shall demonstrate, all four statutory factors weigh convincingly against fair use, whether or not the commercial use presumption applies.

Petitioners and amici have undoubtedly forgotten Justice Cardozo's warning about the "tyranny of labels."[2] Ignoring the specific facts of this case, petitioners and amici simply equate "parody" with "fair use." Some argue for presumptions of fair use for "parody," others urge that "parody" be protected as fair use *per se*, either under the Copyright Act or the First Amendment, and all urge the Court to effectively ignore some—or even all—of the statutory factors if the label "parody" can be affixed.

It is evident, however, from the many learned examples furnished by petitioners and amici that "parody" is a vast tent that covers many species, some that would not raise any copyright infringement concerns at all; others that would unquestionably amount to fair use under any test; and others—such as the "parody" in this case—that seriously jeopardize the legitimate interests of copyright owners and the incentives to creativity that the Copyright Act seeks to foster.

Moreover, the definition of "parody" is malleable and could be applied to virtually every humorous modification of a copyrighted work. The exclusive focus on "parody" thus could open the door to piracy. This danger is especially serious in the case of copyrighted songs, where it is the music that frequently provides their main appeal. Songs are thus particularly susceptible to unfair use by "parodists" who, despite their humorous modifications of the original lyrics, are primarily exploiting the commercial appeal of the original music.

Further, music has an appeal that transcends differences of culture, language and class. Particularly through adaptation of style or lyrics, it can be sold to a variety of audiences. Here, petitioners never offered any evidence to overcome the unavoidable inference, let alone the presumption, that their commercial exploitation of the "heart" of respondent's pop classic "Oh, Pretty Woman" would interfere with respondent's future

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[2] *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1934), *overruled on other grounds by Malloy* v. *Hogan*, 378 U.S. 1 (1964).

opportunities, through "rap" versions or other adaptations, to sell their song to the vast audience to which petitioners sold "Pretty Woman." The suggestion here, that music is either for "whites" or "blacks" and that petitioners' recording or respondent's potential market is confined to only one of these audiences, is simply wrong.

In sum, a cautious application of the statutory factors on a case-by-case basis is essential if owners of musical copyrights are not to be deprived of revenues that have traditionally served as incentives to musical creativity and parody is not to be permitted to serve as a disguise for piracy.

ARGUMENT

I.

WHETHER A PARODY IS A FAIR USE SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS

In *Harper & Row*, this Court made clear that there are no presumptive fair uses and that the invocation of the fair use defense in any particular case must be subjected to analysis under at least the four statutory factors. *See* 471 U.S. at 561. This is evident from the face of the statute. Section 107 specifies that fair use of a copyrighted work for purposes "such as criticism, comment, news reporting, teaching ..., scholarship, or research is not an infringement of copyright." 17 U.S.C. § 107. It then goes on to say that "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include" the four statutory factors. *Id.* As this Court explained:

> [The statutory] listing was not intended ... to single out any particular use as presumptively a "fair" use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision

> as an affirmative defense requiring a case-by-case analysis. *See* H.R. Rep. No. 83, 90th Cong., 1st Sess., 37 (1967); Patry 477, n.4. "[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence." Senate Report, at 62.

Harper & Row, 471 U.S. at 561.

In amending Section 107 in 1992, Congress reaffirmed this intent, stating "courts are to determine the affirmative defense of fair use ... on a case by case basis." H.R. Rep. No. 836, 102d Cong., 2d Sess. at 1 (1992). It further noted that even the uses enumerated in the statute "are not ... presumptively fair." *Id.* at 3.[9]

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[9] Certain of the amici claim (ACLU Br. at 25; Capitol Steps Productions, Inc. *et al.* Br. at 22) that Congress's clear intent to avoid creation of any presumptive fair uses does not apply in the case of parody because of the following sentence in the 1975 Senate Report:

> With certain exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.

S. Rep. No. 473, 94th Cong., 1st Sess. at 65 (1975). The House dropped this puzzling language, which had appeared in earlier drafts, from its final report. *Compare* H.R. Rep. No. 2237, 89th Cong., 2d Sess. at 64 (1966) *with* H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976). The cryptic sentence in the Senate Report is, therefore, entitled to no weight, especially in light of other portions of the legislative history reflecting the understanding that a parody could not be a fair use unless it was "not competitive with the copyright owner's market for his work." *Copyright Law Revision: Report of the Register of Copyrights*, 87th Cong., 1st

(continued...)

Petitioners and the amici nevertheless urge this Court to ignore *Harper & Row*, the statutory language and the legislative history and accord all "parody" the status of a presumptive fair use. *See, e.g.*, Petitioners Br. at 10-13; ACLU Br. at 24-25. Indeed, petitioners and the amici expressly or implicitly demand even more—that parody be deemed not just presumptively but conclusively fair and subject to protection under the First Amendment. *See e.g.*, Petitioners Br. at 10-39; Concerned Law Profs. Br. at 18-27; Home Box Office *et al.* Br. ("HBO Br.") at 22-30; Capitol Steps Productions, Inc. *et al.* Br. ("Capitol Steps Br.") at 15-17. They would elevate parody to an exalted status unique among potential fair uses, treating parody as more important to our society and our democracy than news reporting, education and scholarship, criticism or political and social commentary, categories of fair use which, unlike parody, are expressly enumerated in Section 107. *See, e.g.*, Harvard Lampoon Inc. Br. at 13 (describing parody as the "most productive of all possible uses"). In their zeal to praise parody, they also are oblivious to the incentive provided by copyright protection to create new and original works—without which there would be nothing to parody.

A. Affording Special Treatment to Parody Would Not Serve the Goals of the Copyright Act

The special treatment petitioners and amici would afford parody would be subversive of the goals of the Copyright Act. Such special protection is also wholly unnecessary. The Copyright Act and the fair use exception as currently interpreted properly

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[8](...continued)
Sess. 24 (House Comm. Print 1961). *See* Alan Latman, *Study No. 14: Fair Use of Copyrighted Works* 9-10 in *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee*, 86th Cong., 1st Sess. (Comm. Print 1960).

reconcile the interests of authors and composers of copyrighted original works with the societal interests that may be served by parody.

As petitioners and amici demonstrate, there are a number of definitions of parody. *See, e.g.*, Petitioners Br. at 10-11; HBO Br. at 5-6 & n.3. Under some definitions, parody is any work that mimics the style or content of the original but makes changes that produce comic effects, *see* Oxford English Dictionary (1982); under others the existing work is used as a vehicle for political or social satire, *see* Capitol Steps Br. at 19; and others require that the parody must not merely use the original for comic effect but must make some critical comment about the style or expression of the original. *See Rogers* v. *Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

Most courts insist that, to constitute a parody for fair use analysis, the use must meet the last definition—there must be some critical comment about the original. *See id.*; *Fisher* v. *Dees*, 794 F.2d 432, 437 (9th Cir. 1986); *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 185 (2d Cir. 1981); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *New Line Cinema Corp.* v. *Bertlesman Music Group*, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988); *Metro-Goldwyn-Mayer* v. *Showcase Atlanta Cooperative Productions*, 479 F. Supp. 351, 357 (N.D. Ga. 1979). This definition is the most appropriate because it at least attempts to confine the category of parody to situations where there is a need to make use of some of the content of a specific original work. Parodies that use another work merely as a vehicle for humor or social or political commentary do not need to appropriate copyrighted works to achieve their purpose. *See Rogers*, 960 F.2d at 310; *MCA*, 677 F.2d at 185; *Air Pirates*, 581 F.2d at 758 n.15.[9]

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[9] *See also* II Paul Goldstein, *Copyright: Principles, Law and Practice* § 10.2.1 at 211 (1989); Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act*, ASCAP Copyright Law Symposium No. 34 (1987) at 23.

But whether a work can be made to fit this legal definition of parody—or any other—cannot resolve the fair use issue. To begin with, the boundaries established by such definitions are essentially an illusion. This case illustrates that almost any work that modifies the original for comic effect might also be interpreted as a social or political commentary or a comment on the original work. It is all in the eye (or ear) of the beholder.

Thus, 2 Live Crew's manager portrays their version as merely "humorous." (J.A. 87) The Sixth Circuit majority concluded that the 2 Live Crew version does not make "ridiculous the style and expression of the original, although there is plainly an element of the ridiculous to the new work." 972 F.2d at 1435-36 n.8. Judge Wiseman read the 2 Live Crew version to derisively demonstrate how bland and banal the Orbison song seems. 754 F. Supp. at 1155. Judge Nelson says that, whereas the original is "romantic" and merely implicitly sexual, 2 Live Crew's version "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences" and that, while the original may not seem vulgar, "vulgar is precisely what 'Oh, Pretty Woman' is." 972 F.2d at 1442, 1446 (Nelson, J., dissenting). Meanwhile, the author, Luther Campbell, maintains that his work was an attempt through "comical *lyrics*, to satirize the original work" (J.A. 84) (emphasis added); while petitioners' expert, the folk musician and musical historian, Oscar Brand, finds a "musical joke" under every rap music convention. (J.A. 32)

We agree with the Sixth Circuit majority interpretation, but we also recognize that an imaginative deconstruction of the song also could produce any or all of the other interpretations. It would not be difficult to find similar latent meanings meeting any of the definitions of parody in any work that humorously modifies an original work in some respect. To allow a determination of fair use to turn primarily or presumptively on whether the use fits one of these definitions is dangerous for both copyright owners and parodists. It is dangerous to copyright owners because it would permit the piracy of their works merely through the addition of

elements of humor. It is dangerous to parodists because any attempt to pretend that one of the narrower definitions controls would allow courts to make fair use determinations based on entirely subjective judgments. The Sixth Circuit, therefore, was correct in refusing to allow its fair use determination to turn on whether "Pretty Woman" was a "legal" parody and in basing its analysis on a review of the four factors in light of the record facts.

This approach is particularly appropriate in dealing with sound recordings of musical compositions. Copyrighted songs are especially susceptible to piracy masquerading as parody. It is frequently the catchy tune or the memorable melody that sells the song.[10/] Careful analysis under the four factors is necessary to assure that "parodists" of copyrighted songs cannot unfairly appropriate the commercial value of copyrighted music merely because they make humorous modifications to the lyrics.

Moreover, parodies of musical works require closer scrutiny under the fair use analysis for another reason. Authors of musical works are granted a more limited monopoly than authors of other works. Under Section 115 of the Copyright Act, after the first recording of a musical work is distributed, anyone is entitled to record the work provided they pay the statutory rate and meet

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[10/] *See* Bob Monaco and James Riordan, *The Platinum Rainbow*, 48-50 (1988) ("Hit songs usually have a melodic line that is very catchy and infectious. It may have lyrics that are the focal point of the song. This part usually repeats throughout the tune and it is the part most people remember when they think of the song. This is the hook, and hit songs are built on good hooks. There are instrumental and rhythm hooks as well as vocal ones."); Edward Rothstein, *How Long Will Melody Linger On?*, New York Times, April 18, 1993, § 2, at 23.

the other terms of the statutory compulsory license.[11] The compulsory license, however, contains an important limitation. The compulsory license is only available if the arrangement of the work does not "change the basic melody or fundamental character of the work." 17 U.S.C. § 115(a)(2). Congress inserted this limitation so that the owner could prevent his musical work from being "perverted, distorted or travestied." H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 109 (1976).

Thus, Congress must have intended that at least some versions of the song that "distort" or "travesty" the original could

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[11] 17 U.S.C. § 115 provides in pertinent part:

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License.

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use.

...

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

be forbidden by the copyright owner. "Travesty" and "distortion," however, necessarily overlap with parody; parodies frequently "travesty" or "distort" the original.[12] We do not suggest that Congress in Section 115 intended to outlaw all musical parodies that travesty the original. Nevertheless, to give some meaning to the limitation imposed by Congress, distinctions must be drawn between parodies that travesty or distort the original that are fair uses and those that are not. To label every "parody" a fair use would nullify Congressional intent.

The special treatment petitioners and amici seek for "parody" is also unnecessary. As the amicus briefs so copiously detail, parody has flourished without any of the presumptions or *per se* tests amici now propose. Since the first cases involving parody, courts have refused to treat the presence of parody as dispositive of the fair use inquiry, but have reviewed each case on all its facts. *See, e.g., Loew's, Inc.* v. *Columbia Broadcasting System*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny* v. *Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958); *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Fisher* v. *Dees*, 794 F.2d 432 (9th Cir. 1986).

Further, many of the examples of parody listed by amici do not even implicate the copyright laws because they either are parodies of a style or genre that copy little, if anything, of any specific work (*e.g., Don Quixote* (*see* Harvard Lampoon Br. at 7)); or are so transformative of the work parodied that they cannot be viewed as "substantially similar" to the original (*e.g.*, Joyce's *Ulysses* (*see* HBO Br. at 7 n.6)); or rely on works in the public domain (*e.g.*, Duchamp's parodies of Mona Lisa (*see* ACLU Br. at 16)). Other examples are obviously fair uses, if they would be copyright infringements at all, because they take so little from the

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[12] "Travesty ridicules lofty characters by putting them in a mundane setting." Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L.Rev. 1395, 1395 n.1 (1984).

original (*e.g.*, Lewis Carroll's parodies of Southey or Watts (*see* PEN American Center Br. at 7–8)) or are so clearly not attempts to exploit the commercial appeal of the original (*e.g.*, Beerbohm's parodies of Henry James (*see* ACLU Br. at 13–14)).

Petitioners and amici argue that parodies deserve special treatment because there is a "market failure"; they claim parodists are unable to obtain copyrighted material through the usual operation of a licensing market since copyright owners are unlikely to be willing to license effective parody for any price. *See*, *e.g.*, Petitioners Br. at 16–17; Concerned Law Profs. Br. at 11-14; HBO Br. at 23–24. The substantial business in the licensing of parodies undercuts this "market failure" assumption (J.A. 325); *see also* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1635 (1982). But, even if the assumption were correct, it would not justify a presumption of fair use. Most, if not all, of the uses listed in the preamble to Section 107 are likely to involve market failure because there are a variety of obstacles to obtaining such licenses through the normal operation of a copyright licensing market. These include the copyright owner's dislike for the use (*e.g.*, criticism), transactional costs which render a license impractical (*e.g.*, classroom use) or the need for a timely use that makes licensing effectively impossible (*e.g.*, news reporting). *Id.* at 1633. Yet, Congress made it clear that none of these uses was entitled to a presumption of fair use. *See supra*, at pp. 10-11.

Petitioners and amici also argue that parodies should be presumptively fair uses because they are unlikely to compete with the original. *See* Petitioners Br. at 35; ACLU Br. at 24–25. But no such generalization is possible. Parody's potential for harm to the copyright owner's markets for the original and its derivatives varies widely depending on many factors, such as the degree of commercial exploitation of the original work; the breadth of the markets for the copyrighted work and its derivatives as well as the breadth of the audience to which the so-called parody is directed; the amount and importance of the copyrighted work taken; and the

manner and the medium in which the so-called parody is marketed. There is a vast difference between the potential effect on the copyright owner's markets of a live, one-night performance, for example, and the widespread commercial exploitation of the copyrighted song on a recorded album that is the subject of this case.

B. Parody Requires No Special First Amendment Treatment in the Fair Use Analysis

Nor, finally, does the invocation of the First Amendment lend any weight to petitioners' and amici's pleas for special protections for parody. As one amicus candidly concedes, "Courts uniformly reject First Amendment defenses to copyright claims." (Concerned Law Professors Br. at 19; *see also* HBO Br. at 12–13); *see also Twin Peaks Productions, Inc.* v. *Publications International, Ltd.*, 1993 U.S. App. LEXIS 13454 *29–30 (2d Cir. June 7, 1993). As this Court explained in *Harper & Row*, there is no need for a separate First Amendment analysis because First Amendment protections are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." 471 U.S. at 560. Thus, even in the context of political news reporting, which lies at the core of First Amendment concerns, this Court was content to evaluate a fair use defense to copyright infringement with sole reference to "the traditional equities of fair use." *Id.*

Moreover, petitioners and amici overlook the point, made in *Harper & Row*, that every fair use analysis implicates First Amendment values on both sides of the controversy. The protections afforded the copyright owner are themselves an "engine of free expression," supplying authors with "the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558. This distinguishes fair use controversies from all of the First Amendment cases cited by petitioners.

Further, copyright affords authors a property interest in their unique expression, *see Loew's Inc.*, v. *Columbia Broadcasting System*, 131 F. Supp. 165, 183 (S.D. Cal. 1955), *aff'd sub nom. Benny* v. *Loew's, Inc.* 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958), while there is no corresponding property interest at stake in the flag-burning or libel cases cited by amici. Indeed, a flag-burning statute aimed solely at protecting a state's property interest in a flag would be valid, regardless of the expressive intent of the flag burner. *See United States* v. *Eichman*, 957 F.2d 45, 47 (2d Cir. 1992); *Spence* v. *Washington*, 418 U.S. 405, 409 (1974) (per curiam). This Court also has held that a person could not constitutionally be forced to use his expressive property to further the expressive interests of another. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (holding that a right of reply statute providing mandatory access to a newspaper by political candidates to answer criticisms of their record by the newspaper would violate the First Amendment rights of the newspaper.) In *Tornillo* the Court was unmoved by the claim, also made here, that the use of appellant's expressive property was especially needed to further the message of appellee. *See id.* at 248-51. Surely, parodists have no constitutional right to force a copyright owner to place its expression at the service of the parodist.

Nor is it impermissible "censorship" to allow a copyright owner to refuse to license a parody. *See* Concerned Law Profs. Br. at 20-27. If parody is a fair use then the owner's refusal to license is futile; if the parody is not a fair use, the owner's motive in exercising its rights under the copyright monopoly are no more relevant than they would be if an author of a novel refused to license a particular movie interpretation of the work. Moreover, no copyright owner can censor the critical ideas that underlie the parody. *See New York Times Co.* v. *United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed).

To import the First Amendment into the fair use analysis would rigidify a doctrine whose strength lies in its flexible, case-specific application. Congress recognized, in codifying the fair use defense, that "the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute." H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 66 (1976). A sensitive application of the "traditional equities" of the fair use doctrine is all that is required to confer the needed protection to criticism and parody.

II.

2 LIVE CREW'S "PRETTY WOMAN" IS NOT A FAIR USE OF "OH, PRETTY WOMAN"

Section 107 of the Copyright Act lists four factors that are not exclusive, but that must be included in any fair use analysis. The factors are to be applied "in concert," to give an overall picture of the fairness of the use. *Meeropol* v. *Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). For example, evidence under the first factor (nature and purpose of the use) that the user is commercially exploiting the copyrighted material is relevant to the fourth factor (effect on potential market for or value of the copyrighted work). Similarly, evidence under the third factor (amount and substantiality of the portion taken) is relevant to both the first factor and the fourth factor; the amount taken bears on the real purpose and character of the use and the likelihood of economic harm to the copyright owner. The second factor (the nature of the work) bears on the nature and scope of the potential market that is the subject of the fourth factor.

In assessing the evidence under these factors, it bears emphasis that fair use is an affirmative defense, *see Harper & Row*, 471 U.S. at 561, and that, accordingly, the burden of proving fair use lies with the proponent of the defense. H.R. Rep. No. 836, 102d Cong., 2d Sess. at 3 n.3 (1992); *Rubin* v. *Boston Magazine Co.*, 645 F.2d 80, 85 (1st Cir. 1981); *Ass'n of*

American Medical Colleges v. *Mikaelian*, 571 F. Supp. 144, 151 (E.D. Pa. 1983), *aff'd*, 734 F.2d 3 (3d Cir. 1984).

Here, the Sixth Circuit concluded that petitioners did not carry their burden. As we now show through analysis of the evidence in light of the four factors, the Sixth Circuit was correct.

A. *2 Live Crew's Exploitation of the Commercial Appeal of the Copyrighted Song Was Presumptively Unfair*

The first § 107 factor directs courts to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes... ." Petitioners and amici, like the district court, would award this factor to 2 Live Crew solely on the basis that the use is a "parody." They totally ignore the statutory command to consider the commercial nature or purpose of the use. They also misconstrue the "commercial use" presumption applied by the Sixth Circuit and enunciated by this Court in three decisions in the last decade. Those decisions state: "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony*, 464 U.S. at 451; *accord Stewart* v. *Abend*, 495 U.S. 207, 237 (1990); *Harper & Row*, 471 U.S. at 562.

Petitioners and the amici criticize this presumption on the ground that it threatens to make virtually all parodies (and other categories of potential fair uses) presumptively unfair, because parodists typically seek to profit from their work. *See, e.g.*, Petitioners Br. at 20; Warner Bros. Br. at 10–11; HBO Br. at 14–16. The presumption, however, does not apply merely because the user makes a profit. Rather, it applies where the user is capitalizing primarily on the commercial appeal of the copyrighted material itself, as might be evidenced by the amount and importance of the copyrighted material taken or the emphasis given to the copyrighted material in the marketing of the work. *Harper & Row* makes this distinction clear.

In *Harper & Row*, The Nation gained access to the unpublished manuscript of President Ford's memoirs and published an article describing the memoirs. 471 U.S. at 543. The article included verbatim excerpts consisting of 300 words from the 200,000-word memoirs. *Id.* at 545. In asserting a fair use defense to copyright infringement claims, The Nation argued that, although the publication was for profit, its purpose was news reporting and news reporting was not purely commercial. *Id.* at 562. In responding to this claim—which is much like the claim of parodic purpose made here—this Court explained:

> In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

Id.

The Court held that, although the publication was arguably news reporting, the circumstances demonstrated that the overriding purpose of the publication was "to exploit the headline value of its infringement." *Id.* at 561. The article in question referred to the original work in its title. *Id.* at 542. It included the 300 quoted words that were the "heart of the book" and which assured that "the reader would know it was Ford speaking and not The Nation." *Id.* at 568. Furthermore, the work was intended to "scoop" the publication of the original work and the licensed abstracts, thus showing that it was designed to take advantage of prepublication interest in the original and to serve the same purpose as the licensed abstracts. *See id.* at 562. The presumption was triggered because, even though the work appeared in a news

report, the copyrighted work was exploited for its inherent commercial value.[13]

Lower court cases applying this presumption have turned on the same analysis. *See Hi-Tech Video* v. *Capital Cities/ABC*, 804 F. Supp. 950, 955 (W.D. Mich. 1992) (news report presumptively unfair where it exploited the inherent value of plaintiff's promotional videotape of Mackinac Island by using videotape in news report describing island); *New Line Cinema* v. *Bertlesman Music Group*, 693 F. Supp. 1517, 1526 (S.D.N.Y. 1988) (presumption applied where defendant commercially exploited value of plaintiffs' copyrighted movie in its music video); *Original Appalachian Artworks* v. *Topps Chewing Gum*, 642 F. Supp. 1031, 1034-35 (N.D. Ga. 1986) (presumption applied to alleged parody of Cabbage Patch Dolls where defendant hoped to profit primarily by association of his product with the popular, parodied product). *Cf. Penelope* v. *Brown*, 792 F. Supp. 132, 137 (D. Mass. 1993) (in finding lack of commercial exploitation, emphasis placed on fact that inclusion of the copied material was not made evident to prospective purchasers of book).[14]

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[13] Certain amici argue that *Harper & Row's* inquiry into "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price," 471 U.S. at 562, has no application to parody because parody is not a use which is licensed and thus has no customary price. *See, e.g.*, HBO Br. at 15. But amici miss the point. The issue is whether, even if the use has elements of parody, the user is primarily exploiting the inherent commercial value of the copyrighted work. Whether "parody" has a customary price is irrelevant. The underlying copyrighted material that is being commercially exploited by the user certainly does.

[14] This Court gave the same interpretation to *Harper & Row* in a subsequent case involving the alleged wrongful appropriation of the word "Olympic." *See San Francisco Arts & Athletics* v. *U.S.O.C.*, 483 U.S. 522, 541 n.19 (1987). Relying on the language from *Harper & Row* quoted above at p. 23, this Court held that the use of the statutorily (continued...)

Earlier cases have also focused on whether the use constituted "commercial exploitation." *See D.C. Comics Inc.* v. *Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984) (no fair use where creator of "Superstud" singing telegram relied on inherent value of copyrighted "Superman" rather than the originality and imagination of his parody for market appeal); *Iowa State University* v. *American Broadcasting Companies, Inc.*, 621 F.2d 57, 61 (2d Cir. 1980) (ABC telecasts containing portions of film on wrestler were "commercial exploitation"); *Meeropol* v. *Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977) (summary judgment determining fair use inappropriate since book containing Rosenberg letters could constitute "commercial exploitation"), *cert. denied*, 434 U.S. 1013 (1978).

The facts here demonstrate that the "commercial use" presumption should apply because, whatever its parodic purpose, 2 Live Crew is primarily profiting from the commercial appeal of the copyrighted song.

In the first place, 2 Live Crew marketed the song not as a parody, but as the copyrighted work itself. 2 Live Crew's version of the Orbison/Dees song is listed on their album and compact disc covers and the inner labels simply as "Pretty Woman," written by Orbison and Dees and published by Acuff-Rose. (Campbell Aff. Ex. C) This contrasts with all the other songs on the album, which are attributed to the group's leader, Luther Campbell. (*Id.*) Thus a prospective purchaser examining the album would simply conclude that "Pretty Woman" is a 2 Live Crew recording of the original Orbison and Dees work, without additional music or changes.

Nothing on the album indicates that Pretty Woman is a parody of the original. Moreover, 2 Live Crew is, by its own

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[14](...continued)
protected word by a nonprofit corporation to promote "Gay Olympic Games" was nonetheless a "clear attempt to exploit the imagery and goodwill created by USOC." *Id.*

admission, "one of the most successful rap groups in the country..." (J.A. 87), not a parody ensemble. The group has enjoyed substantial commercial success from "Gold" albums ranked on the Billboard "Rap Chart." (*Id.*) The 2 Live Crew audience would believe it is buying a rap performance of the original copyrighted song "Oh, Pretty Woman."

These facts stand in sharp contrast to the way other commercial parodies are marketed and sold. In all of the scores of parodies cited in the briefs of petitioners and the amici, the name of the parody is changed from that of the original to indicate and highlight the parody intended.[15] In addition, many parodic works bear designations of their character on their exteriors, *see, e.g.*, *Cliff Notes* v. *Bantam Doubleday Dell Publishing Group*, 886 F.2d 490, 492 (2d Cir. 1989) (parody of Cliff Notes stating prominently on cover, "A satire"); *Berlin*, 329 F.2d at 543 (work billed as a "collection of parody lyrics"). Others are offered in a live or televised comedy revue by performers known for their parody, *see, e.g.*, *Elsmere Music, Inc.* v. *National Broadcasting Co.*, 482 F. Supp. 741, 743 (S.D.N.Y. 1980) (Saturday Night Live), *aff'd*, 623 F.2d 252 (2d Cir. 1980), often in circumstances where the consumers who tune in or pay admission to enjoy

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[15] *See, e.g.*, *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 543 (2d Cir. 1964) ("The Last Time I Saw Paris" changed to "The First Time I Saw Maris"; "A Pretty Girl is Like a Melody" changed to "Louella Schwartz Describes Her Malady"), *cert. denied*, 379 U.S. 822 (1964); *Fisher* v. *Dees*, 794 F.2d 432, 434 (9th Cir. 1986) ("When Sunny Gets Blue" changed to "When Sonny Sniffs Glue"); Harvard Lampoon Br. at 2 ("Lord of the Rings" changed to "Bored of the Rings"); HBO Br. at 3 (listing parodies of pop culture icons: "Alladin" changed to "A-lad-Dim," "I Love Lucy" changed to "I Love Luny," "Sports Illustrated" changed to "Sports Titillated"); Petitioners' Br. at n.5 (listing song parodies relating to Iraq's invasion of Kuwait); ACLU Br. at 11 ("Pamela: Or, Virtue Rewarded" changed to "Shamela: An Apology for the Life of Mrs. Shamela Andrews, in which, the many notorious Falsehoods and Misrepresentations of a Book called Pamela are Exposed and Rebutted... .").

parody do not even know what underlying works will be used as vehicles (Capitol Steps Br. Appx. B, Russell Aff. ¶¶ 6, 7, 9).

The extent of the copyrighted material used also shows 2 Live Crew's commercial exploitation of the inherent value of the copyrighted material itself. The most convincing demonstration is to listen to the tapes of "Oh, Pretty Woman" and "Pretty Woman" that are lodged with the Court. (Complaint, Exs. D and E) They demonstrate—and it is not disputed—that 2 Live Crew has taken the most valuable and recognizable parts of the Orbison classic: the "Pretty Woman" refrain and the "distinctive" (Campbell Aff. J.A. 84) and "very recognizable" (Brand Aff. J.A. 32) guitar riff that opens the song and is repeated throughout. Indeed, this riff is copied so exactly that respondent's expert opined that it was probably "sampled"—*i.e.*, electronically duplicated—from the original Roy Orbison sound recording of "Oh, Pretty Woman." (J.A. 140) Such sampling is often employed in rap music to increase the marketability of a song by creating an association with a successful song that the listener will recognize. *See* Note, *A New Spin on Music Sampling: A Case For Fair Pay*, 105 Harv. L. Rev. 726, 727 (1992); *see also* Catherine I. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. of Negro Educ. 245, 255 (1991) (noting rap groups' frequent inclusion of a "hook" from an "older successful song").

2 Live Crew has also taken much more: It is undisputed that the group adopted the opening percussion measure, the melodic line of the song's verse and bridge sections, the lyrical structures, the key and approximately the same tempo as the original work (J.A. 139-40), changing them only to add elements of the rap style such as a "scraper" and off-key singing by one member of the group. *See* n.3, *supra*. In fact, while 2 Live Crew omits a portion of the music of the original, the *only* music in the 2 Live Crew version is taken from the original. 2 Live Crew took the music from "Oh, Pretty Woman" not to briefly evoke the song, but to create a new commercial version of the song as long as the original—over three minutes, the length of a standard commercially marketable pop music single.

Finally, petitioners mistakenly believe that their offer to pay the "statutory rates" and respondent's refusal to grant them a license on that basis weighs in their favor in the fair use analysis. (J.A. 87, 89; *see* Petitioners Br. at 15) Because petitioners' version of "Oh, Pretty Woman" altered the character of the copyrighted work, a compulsory license at a "statutory rate" was not available. More importantly, petitioners' argument is circular: unless a fair use is involved, respondent was entitled to prohibit the use of its song, because the copyright monopoly permits the copyright owner to decide whether particular uses are the best vehicle for marketing its work. *See Stewart* v. *Abend*, 495 U.S. at 228-29.

This case is thus very much like *Harper & Row*. Petitioners took the "heart" of the copyrighted work (and much more) and marketed it to a vast audience of "hundreds of thousands of new listeners" (J.A. 88) as the copyrighted work itself. In these circumstances, there is every reason to thrust the burden on petitioners to prove that, nevertheless, this massive commercial exploitation of the most appealing features of the copyrighted work did not affect the potential market for the original. That is all that the presumption employed by the Sixth Circuit did. With or without a presumption, the first factor favors respondents.

B. "Oh, Pretty Woman's" Nature as A Creative Musical Composition Weighs Against A Fair Use Defense

The second statutory fair use factor is "the nature of the copyrighted work." Both lower courts held that "Oh, Pretty Woman" is precisely the type of original creative work that should be favored under this factor. *See* 972 F.2d at 1437; 754 F. Supp. at 1155-56.

This proposition is universally accepted. *See Stewart* v. *Abend*, 495 U.S. at 237-38; *Sony*, 404 U.S. at 455 n.40; *Twin Peaks Productions, Inc.* v. *Publications International, Ltd.*, 1993

U.S. App. LEXIS 13454 *24 (2d Cir. June 7, 1993) ("[T]he second factor, if it favors anything, must favor a creative and fictional work, no matter how successful.")[16] Petitioners and amici, nevertheless, try to stand this proposition on its head, arguing that since parody frequently targets creative works, this factor favors the parodist. *See* Petitioners Br. at 21-22; Capitol Steps Br. at 17; HBO Br. at 16-17.

Petitioners and amici overlook the underlying reasons why creative works are favored. The purpose of the copyright system is to stimulate such creativity by the offer of financial incentives. Care must be taken before allowing fair use of creative works that could reduce such incentives. *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 182 (2d Cir. 1981); *Hi-Tech Video* v. *Capital Cities/ABC*, 804 F. Supp. 950, 955-56 (W.D. Mich. 1992). The need to preserve such strong incentives is particularly pressing in the case of songs: while many songs are written and marketed, very few succeed. (J.A. 323) At the same time, any countervailing societal interest in fair use is weaker because the public interest in broad disclosure of information contained in factual works is not present in the case of creative works. *See Consumers Union of U.S., Inc.* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984); 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][2] at 102.22 (1992).

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[16] The quoted language also disposes of petitioners' contention that the very success of "Oh, Pretty Woman" should weigh against Acuff-Rose, because the song has already secured "considerable financial benefit" to its owners. *See* Br. at 22, *citing* dictum in *Warner Bros.* v. *American Broadcasting Companies*, 720 F.2d 231, 242-43 (2d Cir. 1983). Nothing could more effectively reduce the incentive of future authors than a rule that the more successful and valuable a work, the less copyright protection it should receive. *See, Bisceglia, supra*, ASCAP Copyright Law Symposium No. 34 at 16-17 (finding such an idea would wreak "havoc" on copyright system).

The "nature of the work" factor favors Acuff-Rose for another reason as well. As the Court noted in *Sony*, 464 U.S. at 455 n.40, copyrights with "broad potential secondary markets ... may well have a broader claim to protection because of the greater potential for commercial harm." A popular song such as "Oh, Pretty Woman" is a work that has a number of potential markets and uses. Songs can be recorded in different styles, to appeal to different audiences. *See e.g. Copyright Law Revision: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong. 2d Sess. 427-30, 439-40 (House Comm. Print 1964) (Statement of Record Industry Association of America) (recognizing that songs regularly appear in various arrangements); *House Committee on the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice Hearings*, 1399-40 (1975) (Testimony of S. Gortikov) (noting that "Bridge Over Troubled Waters" had been recorded in 80 versions and "Yesterday" recorded in 91 versions). They can also be adapted for presentation in a variety of formats other than phonorecords, such as motion picture soundtracks, commercials (J.A. 143-44) and rock videos (J.A. 151). Precisely because of this adaptability, alleged fair uses of songs—including alleged parodies—aimed at audiences other than audiences for "the original version" are more likely to compete with potential uses of the song that might be authorized by the copyright owner, and hence are more likely to interfere with the owner's exploitation of the value of the copyrighted work.

C. 2 Live Crew Copied Excessively From "Oh, Pretty Woman"

1. 2 Live Crew Could Not Take More Than was Reasonably Necessary to Conjure Up "Oh, Pretty Woman"

The third Section 107 factor directs courts to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." While this factor has a quantitative

element,[17] "even more critical than the quantity is the qualitative degree of copying: what degree of the essence of the original has been taken." *Rogers*, 960 F.2d at 311. Thus, in *Harper & Row*, copying only 300 out of 200,000 words in President Ford's memoirs was found to militate against fair use because what was taken was the "heart of the book." 471 U.S. at 565-66, 568.[18]

Courts have recognized that in applying this third factor to a parody some account must be taken of the parodist's need to take enough to "conjure up" the parodied work. *See, e.g., Berlin* v. *E.C. Communications*, 329 F.2d at 545. In order to assure, however, that this qualification does not eliminate the third factor, courts have held that a parody must "take no more from the original than is necessary to accomplish reasonably its parodic purpose." *Fisher* v. *Dees*, 794 F.2d at 439.

We recognize that in some cases this test does not provide a bright-line rule and may require difficult judgments. But such judgments are endemic to copyright law—the determination of infringement itself turns on a test of "substantial similarity" and the distinction between idea and expression. *See Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.

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[17] *See, e.g., Salinger* v. *Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.) (factor favors copyright holder where one-third of 17 letters and 10% of 42 letters used), *cert. denied*, 484 U.S. 890 (1987); *Marcus* v. *Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (wholesale copying precludes application of doctrine); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 756-57 (9th Cir. 1978) (near verbatim copying is not fair use), *cert. denied*, 439 U.S. 1132 (2d Cir. 1979).

[18] *See also Iowa State University* v. *American Broadcasting Companies*, 621 F.2d 57, 61 (2d Cir. 1980) (2.5 minutes out of 28 minute film too substantial); *Hi-Tech Video* v. *Capital Cities/ABC*, 804 F. Supp. 950, 956 (W.D. Mich. 1992) (38 seconds out of 18 minute video substantial); *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (55 seconds out of 1 hour and 29-minute film too substantial), *aff'd*, 672 F.2d 1095 (2d Cir. 1982).

1960) ("The test for infringement of a copyright is of necessity vague ... Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*.") (L. Hand, J.). The alternatives to the "necessary to conjure up" test are either to ignore any special needs of parody (which we are not advocating) or to read the "amount and substantiality" factor out of the statute, as some of the amici urge. *See* HBO Br. at 27; PEN American Center Br. at 14. In fact, the courts have inquired into substantiality in virtually all parody cases.[19] They were correct to have done so, because the "necessary to conjure up" analysis provides important guidance about the appropriate fair use treatment of an alleged parody. If an alleged parody takes more than is reasonably necessary to achieve a parodic purpose, it is more likely that the copier's primary goal is exploitation of the economic value of the original. At the same time, the more that is borrowed and the greater its importance to the copyrighted work, the more likely that the "parody" will compete with the

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[19] *See, e.g., Fisher* v. *Dees*, 794 F.2d at 438–39; *Air Pirates*, 581 F.2d at 758; *United Feature Syndicate, Inc.* v. *Koons*, 871 F. Supp. 370, 381 (S.D.N.Y. 1993); *New Line Cinema*, 693 F. Supp. at 1526–27; *Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 353-59 (S.D. Cal. 1955)*. Petitioners and amici prefer to rely on dictum in the Second Circuit's decision in *Elsmere Music, Inc.* v. *National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam) suggesting the "conjure up" standard was not created as a "limit on copying" and that "[e]ven more extensive taking would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." But *Elsmere* has been justly criticized for suggesting "an open-ended standard whereby wholesale appropriation of another's work becomes possible under the banner of fair use provided only the elements of humor are added." Nimmer § 13.05[C] at 13–102.28(16); *see also* W. Patry, *The Fair Use Doctrine in Copyright Law* 165 (1985). The Second Circuit itself has refused to follow the *Elsmere* dictum. *See Rogers* v. *Koons*, 960 F.2d at 311 ("it is not fair use when more of the original is copied than necessary"); *Warner Bros.* v. *American Broadcasting Co.*, 654 F.2d 204, 211 (2d Cir. 1981).

copyrighted work and its potential derivatives. *See* Beth W. Van Hecke, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465, 488 (1992). Thus, as the Second Circuit has warned, an interpretation of the "necessary to conjure up" standard overly favorable to alleged parodies is improper because such a standard "could be used to shield an entire work that is substantially similar to and in competition with the copyrighted work." *Warner Bros.* v. *American Broadcasting Co.*, 654 F.2d 204, 211 (2d Cir. 1981).

2. *2 Live Crew Has Taken Far More of "Oh, Pretty Woman" Than Necessary to Reasonably Accomplish Any Parodic Purpose*

Comparison of the audiotapes of "Oh, Pretty Woman" and "Pretty Woman" lodged with the Court (Complaint, Exs. D & E) show that what was taken here was excessive by any standard.

As previously described, 2 Live Crew's version takes the "heart" of the song and much more. *See* pp. 2, 27, *supra*. It takes far more than was required to "conjure up" "Oh, Pretty Woman" and accomplish *reasonably* 2 Live Crew's alleged parodic purpose. According to Luther Campbell, to conjure up "Oh, Pretty Woman" and successfully create his parody, it was "sufficient" to include the "distinctive introduction of the original version" and "the first line of lyrics." (J.A. 84) Yet Campbell and 2 Live Crew took much more, using the "distinctive introduction" again and again as the driving force of their song and taking other important elements of the music, including the melodic refrain. (J.A. 140) *See* pp. 2, 27, *supra*. Moreover, Campbell also testified that his intention was to parody only the lyrics of the song: "the parody 'Pretty Woman' was an attempt on my part, *through comical lyrics*, to satirize the original work 'Oh, Pretty Woman.'" (J.A. 84) (emphasis added) Yet, the 2 Live Crew version repeats the music of "Oh Pretty Woman" in long instrumental "breaks" in the middle and at the end of the song during which no lyrics are sung and no parody is attempted. This extensive copying of the music cannot be justified as related to any parodic purpose. Its entire

purpose was to exploit, unadorned, the greatness of the original music.

Nonetheless, the district court accepted 2 Live Crew's contention that the taking was not too substantial. While it recognized that "notable aspects of the original song are plainly present," the court found without explanation that there was "relative brevity" of copying. 754 F. Supp. at 1157. It found that repetition of the key riff sounded like a "scratch on a record," 754 F. Supp. at 1155, when the riff is in fact what drives the 2 Live Crew song and gives it life and commercial appeal.

The district court's error is demonstrated by comparison of 2 Live Crew's taking to the much less substantial takings in *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964), and *Fisher* v. *Dees*, 794 F.2d 432 (9th Cir. 1986), the two cases the district court found comparable to this one. *See* 754 F. Supp. at 1157. *Berlin* did not even involve prima facie copyright infringement. *See* 329 F.2d at 545. The case involved lyrical parodies that did not reproduce the songs' music. *See id.* at 542. Unlike here, the parody songs used different titles and virtually no words were identical. *See* 219 F. Supp. 911, 912-913 & n.1 (S.D.N.Y. 1963) (reproducing songs), *aff'd*, 329 F.2d 541.[20] Petitioners and the district court rely heavily on the statement in *Fisher* v. *Dees* that a song is difficult to parody effectively without exact or near-exact copying of the music. *See* Petitioners Br. at 24; 754 F.2d at 1156. Yet, in that case, the parody at issue lasted only 29 seconds and adopted only

[20] Indeed, the taking here is more excessive than the two songs at issue in *Berlin* on which the district court denied summary judgment on fair use, *see Berlin* v. *E.C. Publications, Inc.*, 219 F. Supp. 911, 915 (S.D.N.Y. 1963): the parodies of the songs "Always" and "No Business Like Show Business." The *Berlin* district court found that because these parodies used the same title as the original and their lyrics revolved around the central theme of the original, they took too much (a ruling that was not part of the appeal to the Second Circuit). *See id.* at 914-915.

6 out of 38 bars of the plaintiff's music. *See Fisher*, 794 F.2d at 434. Further, *Fisher* recognized that the musical "parodist's desire to make the best parody must be 'balanced against the rights of the copyright owner in his original expression.'" *Id.* at 439 (citation omitted). It, therefore, emphasized the "brevity" of the taking. *Id.* Taking the signature guitar riff, the melodic line and other key elements of the copyrighted work and making it the entire music of a three-minute recording is not "brevity." The taking at issue here also stands in sharp contrast to that approved in *Elsmere Music, Inc.* v. *National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980), another case relied upon by petitioners, where an 18 second lyrical parody was sung *a capella*, only four notes out of 100 measures of the original song were taken and the only words used were "I Love." *See id.* at 743-744.[21]

The taking in this case went beyond a parodic purpose. It reflects 2 Live Crew's overriding purpose to commercially exploit the appeal of the underlying copyrighted music.

Finally, the amount and importance of the portion of the copyrighted song taken by 2 Live Crew in itself is evidence that the 2 Live Crew recording is likely to compete with the copyrighted song and its potential derivatives. The likelihood of such harm is magnified by the manner in which the 2 Live Crew recording was marketed and the large audience to which it was sold. Hence, the Sixth Circuit correctly concluded that, even if the amount taken by 2 Live Crew were considered no more than necessary to conjure up the original work, it constituted such a

[21] The assertions of Oscar Brand and M. William Krasilovsky, an entertainment lawyer who disclaimed any expertise as a musicologist or music critic, to the effect that the taking was reasonably necessary to the parody (*see* J.A. 32-33, 95) are wholly conclusory and, as we have shown, incorrect. In any event, as the district court recognized, the question of the substantiality of the taking is an ultimate legal conclusion. 754 F. Supp. at 1156, *citing Fisher* v. *Dees*, 794 F.2d at 438 n.4.

substantial portion of the work that the third factor could not favor fair use. 972 F.2d at 1438.

D. 2 Live Crew Failed to Show That Its Commercial Exploitation of the Copyrighted Song Would Not Affect the Potential Market For or Value of "Oh, Pretty Woman"

The fourth factor—the effect of the use upon the potential market for or value of the copyrighted work—"is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *accord Stewart* v. *Abend*, 495 U.S. at 238.

To negate fair use, the copyright holder need not have suffered actual competitive injury. Rather, as the statute itself provides, there must be only "potential" for such injury: "*some* meaningful likelihood of future harm" must exist. *Sony*, 464 U.S. at 451 (emphasis in original). This harm may consist "not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568. *See* Nimmer § 13.05[A] at 13-102.26 n. 13.1; *Twin Peaks Productions, Inc.* v. *Publications Int'l*, 1993 U.S. App. LEXIS 13454 *26 (2d Cir. June 7, 1993). And in evaluating the potential for injury, courts are to consider not the isolated effect of the defendants' conduct, but whether, if the use "'should become widespread, it would adversely affect the *potential* market.'" *Harper & Row*, 471 U.S. at 568, *quoting Sony*, 464 U.S. at 451 (emphasis in original).[22]

Moreover, this Court stated in *Sony* that: "If the intended use is for commercial gain, that likelihood [of future harm] may be presumed." 464 U.S. at 451. When the reference to "use ... for

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[22] This broad view of potential markets has been applied in parody cases. *See, e.g., Rogers* v. *Koons*, 960 F.2d 301, 312 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 365 (1992); *D.C. Comics* v. *Unlimited Monkey Business*, 598 F. Supp. 110, 118 (N.D. Ga. 1984); *Metro-Goldwyn-Mayer* v. *Showcase Atlanta Co-Op Prod.*, 479 F. Supp. 351, 360-61 (N.D. Ga. 1979).

commercial gain" is understood in light of this Court's explanation in *Harper & Row*, *see* 471 U.S. at 562, the presumption is entirely reasonable. Where the user is exploiting the commercial appeal of the copyrighted work itself, the most logical inference is that the copyright owner also could market the work to the same consumers. That inference is itself evidence of the potential for market harm. Accordingly, the proponent of the fair use affirmative defense must rebut that evidence in order to prevail. II Goldstein, *Copyright* § 10.1.5 at 199 ("If defendant's use is commercial, the defendant continues to bear the burden of proving that the use does not reduce the market for plaintiff's work.").[23]

The existence of a broad market for popular music, the adaptability of music to many genres and tastes, and the very substantial portion of the copyrighted song taken also justify an inference of threatened harm. *See* pp. 27, 30, 33-34, *supra*. In light of this record, the Sixth Circuit's conclusion that there was a presumption of harm was correct. Equally correct was its conclusion that petitioners failed to bear their burden to negate the inferences that gave rise to the presumption.

Petitioners' evidence consists of statements in two affidavits concerning the market appeal of the "Orbison song" and the 2 Live Crew version. The first was an affidavit by Oscar

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[23] Requiring a defendant to produce such evidence is by no means unduly burdensome, as certain of the amici contend. *See* Capitol Steps Br. at 22-23. An alleged infringer, who certainly knows the market for his own work, should face no difficulty assembling evidence to support his defense. Moreover, proof of the market for copyrighted songs should be readily available, through trade publications and other sources. Nor is it unfair that discovery may be required to obtain relevant evidence. *See* Capitol Steps Br. at 23. Parties regularly face the burden of proving elements of a claim or defense with respect to which the opposing party likely has exclusive control of relevant evidence. *See, e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976) (under section 10b-5 of the 1934 Securities Act, plaintiff must plead and prove defendant's scienter).

Brand, a folk musician and music historian, who offered no qualifications as an expert on either the commercial appeal of "Oh, Pretty Woman," Roy Orbison or the "rap" market. He, nevertheless, opined that the copyrighted song was intended for "Orbison's country music audience and middle-America" while 2 Live Crew's version is "aimed at the large black populace which used to buy what was once called 'race' records" and that 2 Live Crew's "popularity is intense among the disaffected, definitely not the audience for the Orbison song." (J.A. 35) Brand offered no evidence to support his sweeping judgments. The other affidavit was from M. William Krasilovsky, an entertainment lawyer who disclaimed any expertise as a music critic or musicologist and emphasized that he did not intend to give any opinions in those capacities. (J.A. 95) He compared "Oh, Pretty Woman" as "recorded by Roy Orbison" and "Pretty Woman" as "recorded by 2 Live Crew" and concluded that "the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." (*Id.*) Based entirely on the "widespread publicity and news coverage involving 2 Live Crew" and listening to the recordings, he opines that the "intended audience for the two songs is entirely different." (*Id.*)

The Sixth Circuit concluded that this testimony was "irrelevant" and could not overcome the presumption of harm because it did not address the impact of 2 Live Crew's version on the potential market for derivative works of "Oh, Pretty Woman." 972 F.2d at 1439. The Sixth Circuit was correct.[24/]

[24/] There is no indication that the Sixth Circuit's decision rested on a finding that the market harm arose from the preclusion of Acuff-Rose from the parody market as petitioner and some amici suggest. *See* Petitioners Br. at 35; Capitol Steps *et al.* Br. at 25. It is worth noting, however, that musical parodies are in fact licensed today by songwriters, bringing them significant revenues. (*See* J.A. 325); Casey Del Casino, *The Potential Harm of Musical Parody: Toward an Enlightened Fair Use Calculus*, 6 U. Miami Ent. & Sports L. Rev. 35, 56-57 (1989); Charles J. Sanders and Steven R. Gordon, *Stranger in Parodies: Weird Al and* (continued...)

It is evident that Brand's and Krasilovsky's conclusions about the audience were based solely on a comparison of the Roy Orbison recorded performance of the copyrighted song and the 2 Live Crew recording. They thus confused the copyrighted song with a specific performance of the song. The copyright monopoly, however, gives Acuff-Rose the right to receive revenues under the compulsory license (or negotiated variations thereof) for any variety of performances of the copyrighted song conforming to the "style or manner of interpretation of the performance involved." 17 U.S.C. § 115(a)(2). Moreover, the copyright owner is also granted the exclusive right to derivative works, which would include arrangements that change "the fundamental character" of the music or lyrics of "Oh, Pretty Woman." *See* 17 U.S.C. § 106(2); 17 U.S.C. § 115(a)(2). There are a wide range of such potential derivative uses, including much more than just parodies. For example, in order to compete in the rap market, Acuff-Rose might decide to license a rap adaptation that substantially changes certain aspects of the music or lyrics of "Oh, Pretty Woman" to specifically appeal to rap fans, or it might decide to license use of a fragment of the work in a sound recording.

Through such original and derivative works, Acuff-Rose could market its song in a wide range of markets for a variety of uses. In addition to the Orbison recording, Acuff-Rose has licensed "Oh, Pretty Woman" for use in a popular motion picture (J.A. 143), has entered the market for heavy metal rock songs with the Van Halen version (J.A. 151), and regularly receives requests to license the work in advertisements and promotional campaigns (J.A. 143). Thus, as Acuff-Rose's director of licensing, a veteran of 35 years in the music business, states, the market for "Oh, Pretty Woman" extends beyond the market for the original Roy Orbison recorded performance. (J.A. 144)

[24/](...continued)
the Law of Musical Satire, I Ent., Media & Intell. Property Law Forum 11 at 35-36 (1990).

This potential market includes what petitioners and their experts describe as the audience for 2 Live Crew's "Pretty Woman": a "rap" market purportedly consisting of "young urban blacks" (Petitioners Br. at 34), a group of consumers whose musical tastes are doubtless not confined to parody.

Rap music typically makes use of all styles of music in ways that provide revenues to copyright music owners. Rap groups regularly record "cover" versions of, or "sample" musical riffs from, works of other styles. Note, *A New Spin On Music Sampling: A Case For Fair Pay*, 105 Harv. L. Rev. 726, 726–28 (1992); Alan Light, *About a Salary or Reality?—Rap's Recurrent Conflict*, 90 South Atlantic Quarterly 855, 860–61 (1992) (describing "crossover" works); Catherine I. Powell, *Rap Music: An Education With A Beat From The Street*, 60 J. of Negro Educ. 245, 251 (1991) ("Rap has been successfully meshed with several genres from rock, pop, and house music to jazz and gospel"). While Acuff-Rose could receive royalties from such uses of "Oh, Pretty Woman," any such use would face competition from 2 Live Crew's work, which has already appropriated the "heart of the song" and sold it to the rap market.

The ability of "Oh, Pretty Woman" to compete in the rap market in which 2 Live Crew sells its records is not just potential—it is very real. The record reflects that the rap group Brother Makes 3 created a rap song that "sampled" the whole chorus section or "hook" of the original Roy Orbison recording. (J.A. 326)[25]

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[25] Acuff-Rose refused to authorize the Brother Makes 3 song. However, it is irrelevant whether or not Acuff-Rose has as yet taken advantage of the potential market in which this competition may occur or whether it has any present plans to do so. *See Pacific and Southern Co., Inc.* v. *Duncan*, 744 F.2d 1490, 1996 (11th Cir. 1984) ("copyrights protect owners who immediately market a work no more stringently than owners who delay before entering the market"), *cert. denied*, 471 U.S. 1004 (1985); *Meeropol* v. *Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert.* (continued...)

Brand and Krasilovsky never address these different uses of the copyrighted song, limiting themselves to the Roy Orbison sound recorded performance of the song. Their testimony, therefore, is not responsive to this Court's direction to consider the potential "harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568.

Moreover, petitioners offer no basis for their stereotyped view of the supposed audiences for the Orbison song or the 2 Live Crew version. American popular music knows no ethnic, cultural, class, or even national boundaries. Indeed, one of the great well springs of creativity in American popular music is the cross-fertilization of music from different cultures, to cite the history of jazz and rock and roll as two obvious examples.[26] Elvis Presley, a southern white, revolutionized "white" musical tastes by drawing on sources that originated in African-American

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[25](...continued)
denied, 434 U.S. 1013 (1978); *see also Salinger* v. *Random House, Inc.*, 811 F.2d 90, 99 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). Moreover, there are often sound business reasons for a refusal to grant a license, including a desire to avoid overexposure of a work that would impair its future value and marketability, a belief that the particular version is not the most effective means of entering a particular market and a business strategy that determines certain uses are not the most effective means of marketing a product. *See* J.A. 324–26; Del Casino, *supra*, 6 U. Miami Ent. & Sports L. Rev. at 58.

[26] *See* Leonard Feather, *Encyclopedia of Jazz* 22–23 (1960) ("The music we recognize today as jazz is a synthesis of six main sources: rhythms from West Africa; harmonic structure from European classical music; melodic and harmonic qualities from nineteenth century folk music; religious music; work songs; and minstrel show music."); Anthony DeCurtis and James Henke, *The Rolling Stone Illustrated History of Rock and Roll* 3–15 (3d ed. 1992).

culture.[27] Rap itself has a wide audience among whites as well as blacks. *See* Powell, *supra*, 60 J. of Negro Educ. at 247–48, 253 (describing pop success of black and white rappers); *see also* Light, *supra*, 90 South Atlantic Quarterly at 865. American popular music is a multicultural blend and arguments, such as petitioners', that seek to confine the appeal of songs to one ethnic audience or another are wholly unfounded. Brand and Krasilovsky offer no basis for concluding that the copyrighted song is not adaptable to the tastes of the vast audience for 2 Live Crew and other rap artists.

There is thus ample reason to believe that the mass marketing of the 2 Live Crew version to hundreds of thousands of record buyers, incorporating and emphasizing the heart of "Oh, Pretty Woman," has the potential for inflicting future harm in markets open to the copyright owner.

CONCLUSION

A careful scrutiny of the facts through the lens of the four statutory factors discloses that 2 Live Crew's recording of "Pretty Woman" is not a fair use of the copyrighted Orbison and Dees song, even if it is a parody. Petitioners and amici have misread the presumptions applied by the Sixth Circuit. The presumptions do not render all parodies unfair uses merely because the parodist makes a profit. As applied in cases like this one, the presumptions merely underscore the burden of proving fair use imposed on the authors of a parody that exploits the commercial appeal of the copyrighted material it copies. A case-by-case examination of parodies under the traditional fair use standards is more than

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[27] *See The Oxford Companion to Popular Music* (1991) (entry "Elvis Presley") ("Presley was ... good-looking, moody, and, above all, a white singer with a black sound and a unique feeling for the blues... . The style of Presley's early recordings might be traced back to the two musical cultures of the Mississippi River region: the black slave and work song, culminating in the blues; and the white country style of rapid banjo and guitar picking.").

ample to protect parody and essential to protect copyright owners. In this case, and on these facts, petitioners simply failed to meet their burden to establish fair use.

The order of the Sixth Circuit should be affirmed.

Dated: June 28, 1993

Respectfully submitted,

SIDNEY S. ROSDEITCHER
(Counsel of Record)

PETER L. FELCHER
STUART M. COBERT
CLAUDIA L. HAMMERMAN*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

*Awaiting admission to the Bar of the State of New York